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No. 96-1378 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEREK ROCCO BARNABEI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The National Legal Aid and Defender Association, and the New York State Association of Criminal Defense Lawyers, pursuant to Rule 37.2 of the Rules of this Court, hereby move for leave to file this *amici curiae* brief in support of Petitioner, Derek Rocco Barnabei. Barnabei, has indicated his consent to the filing of this Brief. * Respondent has withheld its consent in accordance with what its counsel states is its "usual practice" of not consenting to the filing of *amicus curiae* briefs that oppose the Commonwealth's position.

Both *amici* are organizations of criminal defense lawyers who routinely represent indigent defendants in criminal cases, including capital cases. Thus the members have first-hand experience with the inconsistent and widely divergent criteria courts have established to determine when an indigent defendant may obtain a non-psychiatric expert at state expense.

The National Legal Aid and Defender Association (NLADA), in existence since 1911, is a private non-profit membership organization located in Washington, D.C. Its purpose is to promote the availability of quality legal services in civil and criminal cases to all persons who are unable to afford to retain private counsel. Its membership includes hundreds of public defender and assigned counsel offices providing legal services to poor people accused of criminal offenses, as well as many assigned counsel and other private practitioners. The NLADA is committed to protecting the fundamental rights of poor persons accused of crimes, particularly the rights to the effective assistance of

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* Correspondence reflecting the consent of this party has been filed with the Clerk of the Court.

counsel and a fair trial. The NLADA has published *Standards for Defender Services* (NLADA 1976) and *Performance Guidelines for Criminal Defense Representation* (NLADA 1995). Both require the availability and appropriate use of defense experts for the provision of effective, quality representation. *Standards for Defender Services Standard IV, §§ (2)(d), (3)* (NLADA 1976); *Performance Guidelines for Criminal Defense Representation, Guideline 7.5* (NLADA 1995). The rights to the effective assistance of counsel and a fair trial are in jeopardy when, as here, criminal defendants are denied the aid of a defense expert on an issue critical to the state's proof of its case.

The New York State Association of Criminal Defense Lawyers (NYSACDL) is the largest criminal bar organization in New York. The Association is dedicated to advancing fairness and justice in criminal trials. While it frequently files *amicus curiae* briefs in support of important issues in federal and state courts, NYSACDL rarely files such briefs before review is granted. However, New York courts are regularly confronted with applications for defense experts, and NYSACDL members have thus acquired both significant expertise and interest in this area of law. In addition, the recent advent of the death penalty in New York has created a tremendous need for clarity on the right of capital defendants to expert assistance.

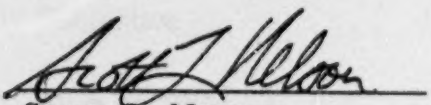
Amici have prepared the following brief to call to this Court's attention the inherent flaws in the stringent standard articulated by the Virginia Supreme Court — as well as other state courts — for appointment of a state-funded expert to assist an indigent defendant. In the experience of *amici*, this standard is neither workable nor appropriate.

Courts applying such standards erroneously view forensic testimony of the type presented by the state at Barnabei's trial as somehow "objective" and "neutral." In

fact, as the multiple scientific studies cited by *amici* persuasively demonstrate, the forensic medical testimony provided in Barnabei's case was highly subjective and misleading, in addition to being presented by a witness inherently allied with the state. Without an expert of his own to testify at trial or to assist in the preparation of cross-examination or trial strategy, Barnabei — like many other indigent defendants — was placed at a palpable disadvantage, in violation of his constitutional rights to a fair trial and equal protection. Such a violation is inimical to *amici's* support of the right to present a defense and the integrity of the adversarial system.

For the foregoing reasons, the motion by *amici* for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,



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INTEREST OF THE *AMICI CURIAE*

The interests of the *amici curiae* are detailed in the accompanying Motion. Briefly, both *amici* are organizations of criminal defense lawyers who routinely represent indigent defendants in criminal cases, including capital cases. *Amici* have a direct and substantial interest in ensuring that the rights to effective assistance of counsel and a fair trial are upheld. These rights are imperiled under the stringent standard imposed by the Virginia courts and other courts for the appointment of a defense expert at state expense, where an expert can assist the defense on an issue critical to the state's proof of its case.

INTRODUCTION

In a capital case, a criminal defendant's access to the assistance of an expert may be fundamental to fashioning and presenting a defense. When the defendant cannot afford an expert, the unrebutted testimony of a state expert may determine the outcome of the trial. In Derek Barnabei's case, the state's expert provided testimony at trial that made the difference between a long prison sentence and a death sentence. Barnabei was convicted of murder with the aggravating offense of rape. The defendant had had consensual sexual intercourse — including anal intercourse — with the murder victim in the weeks before she died. The *only* evidence of nonconsensual intercourse to support the rape conviction — and Barnabei's eligibility for the death penalty — was the medical examiner's testimony that the victim's bruises and an anal tear evidenced force.

Although Barnabei's counsel had the opportunity to cross-examine the medical examiner, he did not benefit from the aid of an expert to prepare that cross-examination, nor did he have the chance to present expert testimony to rebut

the medical examiner. Under the Virginia Supreme Court's standard, Barnabei, in order to receive expert assistance, would have had to make a "particularized showing" that an appointed expert would reach a conclusion that was beneficial to him. This threshold -- especially in the case of an indigent criminal defendant facing the death penalty — is too high and, in the vast majority of cases, insurmountable. As the Petition for Certiorari makes clear, the state and federal courts have developed divergent standards for determining a defendant's entitlement to expert assistance. The *amici* submit this Brief not to repeat the Petitioner's analysis of the conflicting caselaw, but to amplify the reasons why the standard selected by the Virginia courts, and other courts that have erected similar barriers to the appointment of experts, ignores the nature and effects of state-sponsored expert testimony, and deprives the defendant of a fair opportunity to counter the state's expert. A writ of certiorari is needed to clarify standards with due recognition for the realities of expert testimony in criminal prosecutions.

REASONS FOR GRANTING THE WRIT

I.

EXPERT MEDICAL TESTIMONY REQUIRES ADVERSARY TESTING

A. Expert Medical Testimony Is Often Inherently Subjective

The adversary system lies at the very heart of the just administration of the criminal laws. While there is no disputing that an indigent person charged with a crime is constitutionally entitled to oppose the state's lawyers with a lawyer of his own, *Gideon v. Wainwright*, 372 U.S. 335

(1963), that same accused's constitutional right to oppose the state's non-psychiatric expert with an expert of his own needs to be elucidated by this Court. As explained in the Petition for Certiorari, federal and state courts have considered the appointment of defense experts to rebut the state's experts under a babel of standards. Many of these are far more restrictive than the standard adopted by this Court for a psychiatric expert in *Ake v. Oklahoma,* 470 U.S. 68 (1985). In a case in which the forensic testimony presented by the expert was as subjective and indeterminate as the psychiatric testimony in *Ake*, the Virginia Supreme Court adopted one of the most onerous standards — requiring a defendant to make a "particularized showing" that he would actually benefit from "favorable testimony" should an expert be appointed. That court's application of the standard in this case — as well as in the companion case of *Husske v. Commonwealth,* Pet. App. 21a, 476 S.E.2d 920 (Va. 1996), confirms that virtually no matter what showing Barnabei's defense counsel made (short of demonstrating what testimony an appointed expert would give), the appointment of an expert would have been refused. Whatever rule this Court may adopt, Virginia's excessive and unworkable standard deprived Barnabei of a fair trial. It is akin to saying that an indigent criminal defendant gets a lawyer if he can make a particularized showing to the court that he is innocent.

In the trial court, Barnabei sought the assistance of a forensic expert to rebut the testimony of the Commonwealth's medical examiner, whose testimony provided the sole evidence to support Barnabei's rape conviction, and, ultimately, his eligibility for a death sentence. Despite Barnabei's request for an independent forensic pathology expert "to analyze the autopsy photographs and the medical examiner's report, evaluate the examiner's testimony at trial, and, if appropriate, offer

contrary testimony," the trial judge found no need to appoint an expert for the defendant, because he saw no basis for challenging the word of "the man who performed the autopsy." Pet. 4. The Virginia Supreme Court agreed, finding that Barnabei failed to make a particularized showing that he would adduce "favorable testimony" from his expert. Pet. App. 10a.

Both decisions rest on a flawed understanding of the role of forensic experts at criminal trials. The presumption of objectivity and accuracy that the courts below afforded the medical examiner's testimony was unfounded in the context of the testimony he provided regarding the alleged rape.

According to the state's own evidence, Barnabei had consensual intercourse with the victim in the weeks before she was murdered. The evidence supporting the rape conviction consisted exclusively of the medical examiner's testimony — based on photographs he took at the autopsy — that he observed evidence of vaginal bruising and an anal tear. The medical expert offered the opinion that these injuries indicated there was "violent penetration" and that it was "inconsistent with normal consensual intercourse." Pet. App. 8a. This testimony was the only evidence presented by the state to support the jury's ultimate conclusion that Barnabei had raped the victim before murdering her.

Far from being "objective" or "scientific" fact, the medical examiner's testimony at trial was inherently subjective and rested on highly debatable inferences. The overwhelming and longstanding consensus of medical experts is that forensic testimony regarding the physical trauma resulting from an act of intercourse does not establish that the intercourse was non-consensual. *E.g.*, American College of Legal Medicine, *Legal Medicine* 576-77 (3d ed. 1995) ("[T]he presence of wounds does not necessarily mean

that valid consent to coitus was not given. [Various activities] produce minor injuries and may produce severe injuries, even though valid consent to sexual intercourse has been given."); I. Gordon et al., *Forensic Medicine, A Guide To Principles* 360 (3d ed. 1988) ("It should be recognized that the presence of injuries is not necessarily indicative of rape. . . . Injuries may also be inflicted during intercourse which has taken place with the consent of the female."); M.K. Norvell et al., *Investigation of Microtrauma After Sexual Intercourse,* 29 J. Reprod. Med. 269, 270 (1984) (finding that when a magnification technique was used to detect the presence of genital trauma, there was evidence of "microtrauma" in 61.1% of women who engaged in *consensual* intercourse).[1] Specific types of consensual sexual activity, including anal intercourse, are also more likely to result in severe injury. W.G. Eckert et al., *The Pathology and Medicolegal Aspects of Sexual Activity,* 12 Am. J. Forensic Med. Pathology 3, 14 (1991).

Other experts have rejected altogether the notion that a medical expert is even capable of rendering a medical opinion as to whether rape has occurred based on an examination of a victim's physical injuries. *Alleged Rape: An Invitational Symposium,* 12 J. Reprod. Med. 133, 134 (1974) ("There is no way to tell by a medical examination whether rape has occurred. . . . Determining whether actual, forcible rape took place is a legal question — not a medical one.").

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[1] One study of physical trauma occurring during intercourse found that "unequivocal lacerations" appeared in a patient after consensual intercourse. A.A. Lauber & M.L. Souma, *Use of Toluidine Blue for Documentation of Traumatic Intercourse,* 60 Obstetrics and Gynecology 644, 647 (1982). Thus, "consent for coitus does not preclude trauma, just as absence of trauma does not provide proof of consent." *Id.*

The Virginia courts in this case erred when they simply assumed there would be no basis on which to challenge the medical examiner's testimony. The literature demonstrates that the medical examiner's conclusion that the physical evidence indicated that the intercourse was non-consensual was not an objective medical opinion based upon his expertise as a pathologist. Rather, it was a highly debatable interpretation of the physical condition of the victim's body, and one that another expert would be very likely to challenge.

In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the Court wrote that because "[p]sychiatry is not . . . an exact science . . . juries remain the primary factfinders on this issue." 470 U.S. at 81. The *Ake* Court went on to hold that, by presenting information regarding the defendant's mental condition in a meaningful form, "the psychiatrists *for each party* enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* (emphasis added). Neither is forensic analysis an "exact science," and by refusing to appoint a defense expert, the trial court in this case precluded the jury from making "its most accurate determination" as to whether or not a rape occurred.

B. When Presented By A Medical Examiner Or Other State Forensic Expert, Expert Testimony Is Essentially Being Presented By A Member Of The Prosecution Team

Both the trial court and the Virginia Supreme Court viewed the testimony of the state medical examiner as entitled to a presumption of neutrality, placing the burden on the Petitioner to offer a particularized showing that his proposed expert would present favorable testimony conflicting with the examiner. Not only does such a

requirement undermine the presumption of innocence, it also ignores the close collaboration that occurs between the prosecution and the state medical examiner. In fact, the state medical examiner is properly viewed as an arm of the state. Indeed, Virginia state medical examiners typically work hand in hand with the police from the outset of an investigation of an alleged rape and forward all evidence to the district crime laboratory, where it is readily available to the prosecution. W.F. Enos & J.C. Beyer, *Management of the Rape Victim*, 18 Annals of Fam. Prac. 97, 102 (1978).

When state medical examiners testify at trial regarding their physical examination of the victim, they drape the mantle of science over the state's case. As one commentator points out (emphasis added):

> The specialists in the offices of both the district attorneys and the attorneys general have . . . a group of full-time experts at the crime laboratory and in the medical examiner's offices to respond to crime scenes and provide expert testimony when needed. If mental health issues are raised, the prosecution has a group of mental health professionals at the state mental facilities. *No one seriously contends that these professional witnesses are objective.* They routinely testify for the prosecution as part of their work, and prosecutors enjoy longstanding relationships with them.

S.B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer,* 103 Yale L.J. 1835, 1845 (1994). A Virginia forensic psychiatrist, summing up a lengthy career assisting the prosecution, candidly described the relationship between prosecutors and

state forensic experts when he told a reporter that he "credits the forensic unit's psychological and clinical staffs with a stellar record of credibility in aiding prosecutions." M.W. Goodwyn, *Psychiatrist is Ending his Career as a 'Gypsy'; He's Spent 27 Years in Forensic Unit,* Richmond Times Dispatch, Dec. 30, 1995, at B-1.

Not only are medical examiners closely allied with prosecutors in their respective jurisdictions, their fallibility has been widely acknowledged. A survey of the work of coroners, medical examiners and forensic pathologists recognized the many mistakes that have been made in forensic examinations, "paint[ing] a disturbing picture of a process that is, at best, woefully inadequate and, at worst, often inept." M. Hansen, *Body of Evidence: When Coroners and Medical Examiners Fail to Distinguish Accidents from Murders from Suicides, a Botched Autopsy can be the Death of a Fair Trial, an Insurance Settlement or a Civil Suit,* 81-JUN A.B.A. J. 60, 62 (1995).

More generally, a systematic effort to scrutinize the proficiency of government crime labs yielded "dismal results." F.T. Schornhorst, *Don't Be Cowed By Scientific Evidence: A Pretrial Primer for Prosecutors and Defense Attorneys,* 3-SPG Crim. Just. 18, 46 (1988). Even the most vaunted crime lab in the country — the crime lab of the Federal Bureau of Investigation — has been subject to scrutiny and harsh criticism for its work in some of the most important investigations in the nation. A Justice Department report prepared in draft form by the agency's Inspector General found that the crime lab made "scientifically unsound" conclusions in the Oklahoma City bombing case. R. Serrano, *FBI Issued Flawed Bombing Analysis, U.S. Probe Finds; Law Enforcement: Lab's 'Unsound' Conclusions Favor Prosecutors in Oklahoma City Trial, Draft Report States. Case Isn't Expected to be*

Compromised, Agency Chief Says, L.A. Times, March 22, 1997, part A, at 1 . In particular, a supervisory agent came in for the harshest criticism from the Inspector General, who found his analyses to be "scientifically unsound . . . and . . biased in favor of the prosecution." *Id.*

This Court is no stranger to the results to which the prosecution's preferential access to forensic experts can lead. For example, *Buckley v. Fitzsimmons,* 509 U.S. 259 (1993), where the Court held that county prosecutors in Illinois should not receive absolute immunity for fabricating false evidence, was a murder case in which the prosecutors had sought to match boots supplied by the defendant with a bootprint on the door of the victim's home. After studies conducted by forensic experts in Illinois and Kansas failed to produce a reliable connection between the boot and the footprint, the prosecutors turned to a North Carolina anthropologist who was "well known for her willingness to fabricate unreliable expert testimony." Not surprisingly, she was able to make a "positive identification" that the bootprint matched the defendant's boot. *Id.* at 262.

Taken together, the confederation of government forensic experts, police and prosecutors, and the fallibility of the forensic testimony that results, negate the easy assumption that a defendant will generally derive no real benefit from countering the state's expert. Requiring the defendant to make a "particularized showing" that he will be able to provide favorable testimony of his own in rebuttal to the state's expert ignores the reality that such testimony is often biased and unreliable. We do not mean to suggest that state forensic testimony is never provided in subjective good faith, but rather that the institutional realities of the close affiliation between state experts and law enforcement prevent such experts from offering neutral or objective testimony.

C. Unrebutted Medical Testimony Presented By The State Has A Powerful Effect On The Jury

The dangers of one-sided expert testimony in a criminal case — especially a capital case — are further demonstrated by the effect this lopsided testimony can have on the jury.[2] In this case, for example, without the opportunity to rebut the testimony of the state's expert by presenting independent expert testimony, all the jury heard at trial regarding the use of force during intercourse was the testimony of the state medical examiner, diminished only — if at all — by the defense lawyer's cross-examination.

In Barnabei's case, cross-examination was an extremely poor substitute for a defense expert, because of the extent to which the expert couched his interpretations and inferences in the language of science. In addition to hearing a detailed description of the victim's wounds, the jury heard the medical examiner say that "[a] violent penetration" of that area had occurred, and that it was "[v]ery unlikely" the bruise occurred during "normal" consensual intercourse. Trial Testimony of Dr. F. Presswalla at 673. Thus, the expert provided not only the "pure science" within his medical expertise, but also what was in essence a legal conclusion as to the cause of the wounds. Because the expert presented himself as an individual with special qualifications, his testimony was "surrounded by an 'aura of

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[2] Although an indigent criminal defendant's right to the assistance of an expert has been framed under the rubric of due process and equal protection as opposed to his eighth amendment right to be free from "cruel and unusual punishment," U.S. Const. Amend. 8, this is a capital case. When the state imposes the death penalty, there is a heightened need for reliability in the evidence leading to the imposition of capital punishment. *See Eddings v. Oklahoma,* 455 U.S. 104, 110 (1982). This is all the more reason why the presentation of forensic medical testimony in a capital case must be subjected to adversarial testing.

infallibility'" that made it very difficult for the jury to distinguish those opinions that fell within his expertise from those that did not. 29 Wright & Gold, *Federal Practice and Procedure; Evidence* § 6262, at 182-83 & n.19.

Jurors are particularly susceptible to being swayed by such testimony, regardless of its technical merit, because of the credibility and authority they attach to the expert witness himself. Rather than critically assessing the substance of an expert's testimony, jurors often focus on details peripheral to the subject of the testimony, such as whether the expert comes across as impressive, articulate and appealing. One study interviewed jurors after a trial involving extensive expert testimony regarding "voiceprinting." P. Rosenthal, *Nature of Jury Response to the Expert Witness*, 28 J. Forensic Sci. 528 (1983). Confronted with complex or confusing testimony that they did not understand, the jurors shifted their attention to observable characteristics of the expert, or to other ancillary elements of the situation, and were guided in their response by their perception of how the expert came across. In the study, the jurors were most impressed with one witness who was extremely articulate and presentable. The jury's reaction to him — based not on what he said but how he said it and what he was wearing — was that he was a "real scientist." *Id.* at 529-30. Given such juror responses, there is an obvious danger that where only one side has a "real scientist," it will receive an unfair and potentially decisive advantage.

When a defendant has an expert of his own, it makes a difference. One study showed that jurors are far more sensitized to and skeptical toward the prosecution's expert testimony when the defense presents an expert who can expose the problems and unreliability inherent in such testimony. The defense expert thus provides a "useful safeguard against false convictions." B. Cutler et al., *Expert*

Testimony and Jury Decision Making: Empirical Analysis, 7 Behav. Sci. & L. 215, 223 (1989). In this case, for Barnabei to participate on a remotely even footing with the state, he would have had to put forward expert testimony of his own.

II.

COURTS WIDELY MISPERCEIVE THE NATURE OF FORENSIC TESTIMONY

The misperceptions as to the nature of forensic testimony offered by prosecution experts upon which the Virginia courts based their decision in this case are widespread. For example, in *Schultz v. State*, 497 N.E.2d 531, 532 (Ind. 1986), the defendant was convicted of murder on the strength, *inter alia*, of testimony by forensic experts for the prosecution regarding footprints found at the crime scene and the analysis of blood on a towel found at the defendant's residence. The Supreme Court of Indiana upheld the trial court's denial of the defendant's motion for appointment of experts, holding that:

> The testimony of [the state's] experts involved precise, physical measurements and chemical testing, and there is no showing that these experts were less than precise or able in their testing and observations.

Id. at 534. For the reasons discussed above, however, this model of forensic analysis as akin to mathematical calculation is erroneous. For example, in the context of a rape charge, the fact that trauma can and does routinely occur during consensual intercourse means that a forensic expert opining, on the basis of such trauma, that intercourse

was non-consensual is necessarily offering not a "precise, physical measurement," but a judgment based on speculation.

Nevertheless, other courts have also adopted the model of the state forensic expert as a mere reporter of objective scientific fact. In *Hicks v. State*, 256 Ga. 715, 717, 352 S.E.2d 762, 769 (Ga.), *cert. denied*, 482 U.S. 931 (1987), another murder prosecution, the defendant sought appointment of an expert to analyze blood samples found in his car and on his clothes, in order to counter testimony by state experts that the samples were "consistent" with the victim's blood. Apparently sharing the *Schultz* court's view that forensic analysis is merely an exercise in "precise, physical measurements and chemical testing," the Supreme Court of Georgia approved the trial court's refusal to appoint such an expert because, in part, the trial court offered the defendant an opportunity to have the state crime lab perform "any desired additional tests." *Id.* Again, the court's analysis ignored the defendant's need for the opportunity to invoke the judgment and analysis of an independent expert, and forced him to rely solely on members of the prosecution team.

The *Schultz* court went on to suggest that the defendant might have qualified for the appointment of an expert if he had shown "that the truth or accuracy of [the state's experts'] testimony is questionable." 497 N.E.2d at 534. Other courts, again apparently viewing forensic analysis as a matter of precise measurement, rather than judgment, have followed a similar course, denying the appointment of an expert where the defendant fails to show the state's experts to be "incompetent." In *Moore v. Zant*, 722 F.2d 640 (11th Cir. 1983), a defendant convicted of murder sought habeas relief. "Much of the evidence" against him at trial consisted of testimony by state experts regarding their analysis of physical evidence. *Id.* at 648.

The court found no error in the trial court's refusal to appoint a defense expert, because the defendant did not show that those witnesses were incompetent. *Id.* at 649; *see also Johnson v. State,* 731 P.2d 993, 1007 (Okla. Ct. Crim. App.), *cert. denied,* 484 U.S. 878 (1987); *Bostic v. State,* 173 Ga. App. 494, 496, 326 S.E.2d 849, 851 (Ga. App. 1985). In *Yohey v. Collins,* 985 F.2d 222, 227 (5th Cir. 1993), the Fifth Circuit demanded, as a prerequisite to appointment of a defense expert, that the defendant show that a state expert's findings are "inaccurate or . . . subject to disagreement between experts." Of course, to the extent judgment enters into forensic analysis, opinions will always be subject to disagreement.

Some of these same decisions premise the appointment of a defense expert upon some affirmative showing of "bias" on the part of a state expert. *Moore,* 722 F.2d at 649; *Bostic,* 173 Ga. App. at 496, 326 S.E.2d at 851. These decisions ignore the close collaboration between prosecutors and state forensic experts, as well as the fact that such experts often view their role as "aiding" prosecutors.

Finally, courts have also looked to defendants' opportunity to cross-examine prosecution experts in denying the appointment of a defense expert. *E.g., Bostic, supra; Johnson, supra; Johnson v. Mississippi,* 476 So.2d 1195, 1203 (Miss. 1985). In *Moore, supra,* the court held that defense experts were unnecessary where prosecution experts were, on cross-examination, "forthright in admitting the limitations of their opinions." 722 F.2d at 649. For example, the *Moore* court relied on the state's expert in hair analysis admission that it "is impossible to determine in forensic science" whether two hair samples come from the same person. *Id.*

However, a defense expert clearly could have offered more than testimony to this effect. Although the prosecution's expert in *Moore* admitted that it is impossible to determine with certainty whether two hair samples perceived to be "microscopically identical" in fact came from the same individual, he testified that "I'm right every time" about whether two samples are in fact "microscopically identical." A defense expert could have offered testimony regarding the extent to which the question of microscopic identity is one of judgment, as well as his own judgment as to the "identity" of the samples at issue in *Moore*. Such an expert would also have provided crucial assistance to defense counsel in preparing the cross-examination of the state's expert. *See Ake v. Oklahoma,* 470 U.S. 68, 80 (1985) (noting that defense psychiatrist is necessary because, in part, "[t]hey know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers").

Moreover, cross-examination and the presentation of expert testimony by the defense are not interchangeable arrows in the defense lawyer's quiver. This is due not only to the impact an expert can have on the jury, as described above, but also to the difficulties inherent in cross-examining an expert. Recognizing that "the testimony of expert witnesses is pivotal — it decides the case," Judge Schwarzer has succinctly identified the limitations of cross-examination. W. Schwarzer, *Ethics and the Expert Witness,* 2 Shepard's Expert and Scientific Evidence 587, 588 (1995). He explains (*id.* at 591):

> First, expert cross-examination is probably the most difficult task a lawyer faces, and few are able to do it well;

> Second, lawyers will not always have the information necessary to cross-examine effectively. This is particularly true in criminal cases where the defendant may not have the resources to prepare thoroughly and also where science is involved;
>
> * * * *
>
> Finally, there is the adrenaline factor. . . . [U]nder the assault of the cross-examiner, the adrenaline tends to flow and it is natural for the expert to want to defend what she has said and done, even if it may lead to overstatement.

Ultimately, the unwillingness of many courts to afford indigent defendants an opportunity to counter forensic expert testimony offered by the state springs from a fundamentally erroneous conception of the nature of such testimony. The notion that a defendant may only be permitted to match the government's access to expert assistance when he can demonstrate that the government's experts are "incompetent" or have made an identifiable "error," or that an expert retained on his behalf would provide specific favorable testimony, rests on a presumption that, absent such proof by the defendant, the government's experts will simply be providing objectively verifiable and scientifically sound facts, the precise bounds of which can be adequately tested simply through cross-examination.

The problem, however, is not necessarily that the government's experts are incompetent or "wrong" about specific factual matters — it is that they are the *government's* experts, and that their partisan role inevitably colors the inherently subjective and debatable inferences to which they

testify. Thus, imposing on a defendant the impossible burden of demonstrating in advance specific deficiencies in the government's expert proof — without the expert assistance that would allow him to do so in the first place — is particularly unwarranted. The result of such a requirement is that, without the ability to respond in kind, the defendant is unable either to explain to the jury the limitations of the government's expert proof or to present to the jury the alternative interpretations of the evidence that a defense expert could provide. The standard applied by the Virginia courts in this case and by other courts that have erected similar barriers to the appointment of defense experts thus frustrates the promise of equal justice held out by this Court's decision in *Ake*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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